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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1497

IN THE MATTER OF THE PETITIONS OF UNITED STATES STEEL CORPORATION AND DEN NORSKE AMERIKALINJE A/S FOR EXONERATION FROM OR LIMITATION OF LIABILITY

JEAN E. COOK, Administratrix of the Estate of Charles H. Cook, Deceased,
Petitioner,
v.
UNITED STATES STEEL CORPORATION AND DEN NORSKE AMERIKALINJE A/S, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Jean E. Cook prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit which vacated the judgment of the District Court and remanded the cause for a redetermination of damages consistent with the rulings set forth in its opinion.

OPINION BELOW

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit have not yet been officially or unofficially reported but are set forth in the separate Appendix of Petitioner Lamp, pp. 43-88.

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 1970. The jurisdiction of this Court is invoked under 28 USC § 1254 (1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in vacating an award of prejudgment interest in a death case arising under the Jones Act, Death on the High Seas Act and general maritime law, where the liability of shipowners had been stipulated, but the determination of damages has already taken in excess of five years and is not yet completed?

2. Is a claimant in a death case arising under the Jones Act, Death on the High Seas Act and general maritime law, entitled to have the value of her award for future damages increased to compensate her for the incursions of future inflation into the purchasing power of her award, where expert witnesses for both sides testified that inflation is a permanent trend in this country but differed only in the rate of inflation which they predicted?

3. Did the Court of Appeals err in disallowing various elements of claimant's award because, in effect, claimant was unable to prove to a mathematical certainty the exact amount of her damages, even though the fact of damage, i.e. liability, had been stipulated?

STATUTES INVOLVED

The Jones Act

46 U.S.C. § 688:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Death on the High Seas Act

46 U.S.C. § 761:

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S.C. § 762:

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be appointed among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Federal Employers' Liability Act

45 U.S.C. § 51:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations,

shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 59:

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

STATEMENT OF THE CASE

The instant case arises from the sinking of the *Cedarville,* owned by United States Steel Corporation, hereinafter referred to as United States Steel, following its collision with the Norwegian ship *Topdalsfjord,* owned by Den Norske Amerikalinje, hereinafter referred to as Den Norske, on May 7, 1965 in the Straits of Mackinac. Petitioner Jean E. Cook is the Administratrix of the estate of Charles H. Cook, one of the ten members of the Cedarville crew who lost their lives as the result of the collision.

Various proceedings were pursued in the courts below which are summarized in the Opinon of the Court of Appeals. (See Appendix of Petitioner Lamp, pp. 43-46.) However, for purposes of this review, it is only necessary to know that the issue of compensatory damages was referred by the District Court to two Commissioners upon a stipulation of liability on the part of the ship owners. Extensive hearings were held by the Commissioners and they in turn filed their awards and opinions for the various claimants. (For the full text of these awards and opinions, see Appendix of Petitioner Lamp, pp. 1-36.) The Commissioners' findings of fact and law together with the award of $194,491.00 to Petitioner Jean E. Cook were adopted *in toto* by the District Court. (See Appendix of Petitioner Lamp, pp. 37-42.)

On appeal, the Court of Appeals found various items of damages to have been computed erroneously and consequently vacated the judgments of the District Court and remanded the cause for further proceedings. (For the opinion of the Court of Appeals, see Appendix of Petitioner Lamp, pp. 43-87.) Petitioner Cook seeks review herein of several critical issues which she contends were erroneously decided by the Court below.

Inasmuch as this case involves rights arising under the Jones Act, 46 U.S.C. §688, Death on the High Seas Act, 46 U.S.C. §761-2, and under general federal maritime law the basis for federal jurisdiction in the court of first instance was 28 U.S.C. §1331 and 46 U.S.C. §§688, 761.

REASONS FOR GRANTING THE WRIT

1. DID THE COURT OF APPEALS ERR IN VACATING AN AWARD OF PRE-JUDGMENT INTEREST IN A DEATH CASE ARISING UNDER THE JONES ACT, DEATH ON THE HIGH SEAS ACT, AND GENERAL MARITIME LAW, WHERE THE LIABILITY OF SHIPOWNERS HAD BEEN STIPULATED, BUT THE DETERMINATION OF DAMAGES HAS ALREADY TAKEN IN EXCESS OF FIVE YEARS AND IS NOT YET COMPLETED?

The shipwreck and the loss of the life of petitioner's decedent occurred on May 7, 1965. The liability for compensatory damages of the shipowners had been stipulated shortly thereafter. To date, almost six years later, petitioner has not received one penny of the damages to which all parties concede she is entitled.

The District Court held that a debt due on the date of death is payable on that date and, if not then paid, should bear interest until it is paid in order to compensate the injured party more fairly and to stimulate the parties to proceed as expeditiously as possible in the litigation. Consequently, the court awarded pre-judgment interest at the rate of 5% per annum. It noted the apparent split of authority in the various circuits, citing *Cleveland Tankers, v. Tierney,* 169 F. 2d 622 (6th Cir. 1948), which denied prejudgment interest, and the more recent cases of *Moore-McCormack Lines, Inc. v. Richardson,* 295 F. 2d 583, 592-95 (2d Cir. 1961) *(The Mormackite),* and *Petition of Marina Mercante Nicaraguense, S.A.,* 364 F. 2d 118 (2d Cir. 1966), 248 F. Supp. 15 (D.C.N.Y. 1965) (*The El Salvador*) which granted such interest.

Even if prejudgment interest may not be appropriate in all cases, especially those where the issues of liability are

seriously in question, clearly in a case like the instant one, a stipulation of liability should carry with it an obligation to pay pre-judgment interest. The award of such interest by the District Court is in line with authority from other Circuits and from the vast majority of other jurisdictions. Consequently, Petitioner Cook urges that the District Court's award of 5% pre-judgment interest be reinstated.

2. IS A CLAIMANT IN A DEATH CASE ARISING UNDER THE JONES ACT, DEATH ON THE HIGH SEAS ACT AND GENERAL MARITIME LAW, ENTITLED TO HAVE THE VALUE OF HER AWARD FOR FUTURE DAMAGES INCREASED TO COMPENSATE HER FOR THE INCURSIONS OF FUTURE INFLATION INTO THE PURCHASING POWER OF HER AWARD, WHERE EXPERT WITNESSES FOR BOTH SIDES TESTIFIED THAT INFLATION IS A PERMANENT TREND IN THIS COUNTRY BUT DIFFERED ONLY IN THE RATE OF INFLATION WHICH THEY PREDICTED?

The District Court, adopting the findings of fact of the Commissioners, held that inflationary trends in this country would continue into the future, resulting in a loss in the purchasing power of the dollar by 4% per annum. Consequently, the Court held that the discount of future damages to present value at a rate of 4% simple interest should be offset by the 4% inflationary trend which would reduce the value of such award into the future. The decision to take into account the effects of future inflation was based on the testimony of experts offered by both sides. Each testified that inflation was a more or less permanent trend in this country, they differed only to the extent to which the rate of inflation could be predicted. By the introduction of such testimony, both sides in effect conceded that the question of inflation and the rate thereof

was an issue of fact to be decided on the basis of testimony offered in support of their respective positions.

The District Court viewed this issue in exactly that manner. The question was not whether a loss would occur due to inflation, but rather how much of a loss. The Court referred to the 4.8% rise in consumer prices in 1968 (which rate incidentally rose to 6.1% in 1969 and presumably even higher in 1970) and decided that "the 4% non-compounded rate of increase appears reasonable". Thus, on the basis of the factual evidence in the record and the virtual agreement of the experts as to the propriety of considering the inflationary effects upon the award, the Court's ultimate decision on this fact is supported by the record and is not clearly erroneous.

However, the Court of Appeals reversed the District Court on this issue and held that in the Sixth Circuit the prospect of a future decline in the purchasing power of a dollar may not be used to offset the reduction to present value, citing *Sleeman v. Chesapeake & Ohio R.R. Co.*, 414 F. 2d 305 (6th Cir. 1969). Research has disclosed no other cases in the federal system which have dealt with this particular issue. However, the continuing threat of inflation, with its devasting effect on fixed incomes, is and has been an everpresent political, social and economic problem of this country. To ignore the existence of this element of the economic future is simply to avoid one of the most pressing problems this country faces today and will continue to face far into the future. It is grossly unfair to expect petitioner Cook, who has already suffered the loss of her husband to bear the full brunt of loss occasioned by future inflation, where all parties to this litigation agree that such inflation is relatively certain to occur and in an amount which will be harmful to her economic position.

Although the District Court calculated both the reduction to present worth and the rate of future inflation at a simple rate of 4% per annum, the Court of Appeals held in Footnote 11 that such rate should be compounded in accordance with generally accepted actuarial principles. Accordingly, petitioner Cook contends that the rate of 4% per annum for future inflationary trends should also be calculated in a compound rather than a simple way inasmuch as the effects of these two aspects of the economy are complementary and must be applied in the same manner.

Accordingly, Petitioner Cook urges this court to decide an important question of federal law which has not been but should be settled by this Court and consequently to reinstate that portion of the District Court's opinion which offsets the reduction of future damages to present value by the certainty of a future decline in the purchasing power of the dollar.

3. DID THE COURT OF APPEALS ERR IN DISALLOWING VARIOUS ELEMENTS OF CLAIMANT'S AWARD BECAUSE. IN EFFECT, CLAIMANT WAS UNABLE TO PROVE TO A MATHEMATICAL CERTAINTY THE EXACT AMOUNT OF HER DAMAGES, EVEN THOUGH THE FACT OF DAMAGE, I.E. LIABILITY, HAS BEEN STIPULATED?

At noted above, the life of Charles H. Cook was lost in a shipwreck on May 7, 1965. As administratrix of his estate, Petitioner Cook is entitled to receive compensation from the shipowners for the pecuniary loss which she and her minor child suffered. There are many items of damage which combine to make up the entire loss for which petitioner Cook is entitled to compensation. The question arises, however, whether she is required to prove these

items of damages to a mathematical certainty or, in the event she fails to do so, to be deprived totally of compensation for these aspects of her loss. The landmark decision of *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) laid down the basic rule as follows:

> It is true that there was uncertainty as to the extent of the damage but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner has sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in the respect of their amount.

Petitioner Cook contends that the Court of Appeals erred in several respects by requiring her to sustain an unreasonable burden of proof in presenting her claim for damages on several different kinds of items. In addition to the items of pre-judgment interest and an offset for future inflation, discussed *supra*, the Court of Appeals also reduced Petitioner Cook's award in several other respects. For example, the Court of Appeals held that the earnings base upon which the Commissioner's computed earning capacity loss was clearly erroneous, and substituted its own yardstick, i.e., that the earnings base must be computed upon the higher of two bases: (1) the year immediately preceding the accident or (2) the average of the four years preceding it. The Commissioners had found, as a basis for its determination, that the highest of the decedent's annual earnings during the five years prior to the accident, was fair. However, with respect to peti-

tioner Cook's decedent, even this more generous formula was inadequate in that Mr. Cook had been promoted shortly prior to the accident and hence his previous earnings would not reflect what his potential earnings would be. Nevertheless, to require an earning base to be calculated on an arbitrary fomulation by the Court of Appeals not only invades the province of the fact finder, but holds claimant to an unreasonable burden of proof.

Similarly, the Court of Appeals reduced the Commissioners' award for pre-judgment productivity increases on earnings from the original 4-5% to 1½% per annum. The Commissioners had based their award on expert testimony that all wages tend to increase 5 to 6% annually. However, the Court of Appeals found that decedent's union contract only provided for an annual increase of 1½% and used this extremely low figure as a virtual ceiling on projected productivity increases. The record shows that Mr. Cook had never felt compelled to continue employment with respondent United States Steel, and in fact on several occasions had undertaken to run his own separate business. There is no reason to hold Mr. Cook's projected pre-judgment productivity increase to an amount that is considerably below the national average on the unfounded assumption that he would have continued in the employ of United State Steel. The Commissioners' findings in this respect were supported by the record and should have been sustained.

Similarly, the Court of Appeals vacated the Commissioners' award for care and counsel to decedent's widow on the grounds that *Michigan Central R.R. Co. v. Vreeland,* 227 U.S. 59 (1912) only permits an award of damages to widows for loss of care, counsel and guidance where "specific evidence of both the nature of the services

lost and the cost of obtaining such services elsewhere" is introduced. The Court went on as follows:

> We believe *(Vreeland)* must be read as limiting an award for loss of care and guidance to those cases in which the services of the decedent constituting such care and advice can be enumerated and their replacement value estimated. Here there was no evidence of the nature of the care and guidance of counsel which the decedents gave to their wives prior to their deaths which could only be supplied by the service of another for compensation, much less any showing that any such care or counsel had any pecuniary value. (At page 35-36)

Contrary to that statement, however, the record is replete with examples of decedent Cook's efforts at providing counsel, care and guidance to his wife during his lifetime. Naturally, a substantial portion of these services flowed from the love and devotion which he felt towards his wife. However, it is obvious that his widow will have to seek such services elsewhere and at a financial cost. Inasmuch as it is impossible for petitioner Cook to prove with mathematical certainty the actual cost of replacing every kind of care, guidance and counsel which her husband would have rendered to her had he lieved, it seems clear that the impact of *Story Parchment* requires the Court to sustain the modest award of $8,000 to compensate her for this element of her loss.

The thrust of *Story Parchment* is to provide compensation for injured parties even as to those elements of damage which cannot be proved to a mathematical certainty. The policy behind that decision is to require the wrongdoer to shoulder his burden of compensation without hiding behind unreasonable obstacles placed in the way of a claimant's proofs. Petitioner Cook contends that the deci-

sion of the Court of Appeals vacating her award in several critical respects requires *her* rather than the shipowners to bear the burden of proving the exact value of future losses which, by their very nature cannot be determined with exactitude. Although her loss can never be fully compensated for in money, she should not be deprived of any portion of her award which is supported by the record to the extent such proof is reasonably obtainable. Accordingly, petitioner Cook urges this Court to review this case in the light of *Story Parchment* and to reinstate her award to the extent required by that decision.

CONCLUSION

For the foregoing reasons, petition Cook urges this Court to grant the Petition for Writ of Certiorari so that the decision of the Court of Appeals may be reversed and the award of the District Court may be reinstated.

Respectfully submitted,

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BRIEF OF RESPONDENTS IN OPPOSITION.

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BRIEF OF RESPONDENTS IN OPPOSITION.

COUNTER QUESTIONS PRESENTED.

1. Was the Court of Appeals correct in holding that an award of prejudgment interest would amount to an abuse of discretion in a maritime case where liability was contested for two years, the type and amounts of damage sustained are still contested, discovery on the question of compensatory damages was delayed upon the motion of the claimant and the District Court specifically found the shipowners proceeded expeditiously and did not need the discipline of a prejudgment interest payment?

2. Was the Court of Appeals correct in holding that awards for future damages were to be discounted to present value in accordance with this Court's decision in *Chesapeake and Ohio Ry. Co. v. Kelly,* 241 U.S. 485 (1916), without consideration of the effects of inflation upon either the purchasing power or earning power of the dollar?

3. Was the decision of the Court of Appeals in conflict with prior decisions of this Court or with decisions of other Courts of Appeals?

STATUTES INVOLVED.

Shipowners concede the application of the Jones Act, 46 U.S.C. § 688, and, by reference, the F.E.L.A., 45 U.S.C. § 51 et seq., with respect to the claim against United States Steel. However, the Death on the High Seas Act, 46 U.S.C. § 761 et seq., has no application to this case since the sinking of the *Cedarville* and resulting death of Petitioner's decedent, Charles Cook, occurred in the waters of the Great Lakes in the Straits of Mackinac between Lake Huron and Lake Michigan, and not on the High Seas. Section 767 of the Death on the High Seas Act expressly provides that that Act is not applicable to the Great Lakes.

COUNTER STATEMENT OF THE CASE.

For additional facts relating to the proceedings below, reference is made to the Shipowners' Counter Statement of the Case in their Brief of Respondents in Opposition to the Lamp Petition, No. 1370, pp. 2 to 4.

With respect to Cook claim, of the total award in the District Court of $194,491.00, $12,150.00 was awarded as prejudgment interest.

ARGUMENT.

I. The Court of Appeals Was Correct in Holding that an Award of Prejudgment Interest in This Case Would have Amounted to an Abuse of Discretion.

Petitioner, in claiming that the Court of Appeals erred in holding that an award of prejudgment interest amounted to an abuse of discretion, has advanced no arguments requiring any further response than that set forth in Brief of Respondents in Opposition to the Lamp Petition, No. 1370, which is confined to the sole issue of prejudgment interest, and in Brief of Respondents in Opposition to the Fuhrman Petition, No. 1475, particularly pp. 35-38.

The Court of Appeals correctly followed the rule of this Court in *The Scotland,* 118 U.S. 507 (1886).

II. The Court of Appeals Was Correct in Holding that an Award for Future Damages Is to Be Discounted to Present Value in Accordance with This Court's Decision in Chesapeake & Ohio Ry. Co. v. Kelly.

Except in two limited respects, Petitioner's claim that the Court of Appeals erred in holding an award for future damages is to be discounted to present value in accordance with this Court's decision in *Chesapeake & Ohio Ry. Co. v. Kelly,* 241 U.S. 485 (1916), requires no further answer than that set forth in Brief of Respondents in Opposition to the Fuhrman Petition, pp. 31-35.

It should be noted, however, that Petitioner is inaccurate in stating that the District Court's decision to take into account the effect of future inflation was based upon the testimony of experts offered by both sides. The District Court based its assumptions concerning inflation, not on the testimony of any expert, but on a document not in evidence, *The Economic Report of the President to*

Congress, January 1969 (31). Thus, the District Court found an offset for inflation in all five death claims before it, including those claims (Haske, Jones and Fuhrman) where there was no economic expert testimony even remotely related to the question of inflation. Moreover, Petitioner's expert assumed a probable rate of inflation of between 1½% to 2% per annum (733, 749) and even this limited rate of inflation did not begin to approach the rate of 4% per annum assumed by the District Court.

Further, contrary to Petitioner's assertion that no other cases in the federal system have dealt with the issue of inflation, this question has been before other courts and they have reached precisely the same conclusion as the Court of Appeals below. See *McWeeney v. New York, N.H. & H. R.R. Co.*, 282 F.2d 34 (2d Cir., 1960) cert. den. 364 U.S. 870 (1960), and *Armentrout v. Virginian Ry. Co.*, 72 F. Supp. 997 (S.D. W.Va., 1947), cited with approval in the *McWeeney* case, both of which are discussed more fully in Brief of Respondents in Opposition to the Fuhrman Petition, No. 1475, pp. 33-34.

The Court of Appeals was correct in reversing the District Court and remanding the case with the direction that the District Court is to discount the awards for future damages to present value in accordance with generally accepted actuarial principles and the *Kelly* case.

III. The Decision of the Court of Appeals Is Consistent With the Decisions of This Court and Those of the Courts of Appeals of Other Circuits.

Petitioner's final argument groups together a number of essentially unrelated points concerning various items of damage which the Court of Appeals remanded for further determination by the District Court or disallowed.

Petitioner complains that the Court of Appeals disallowed an award to the widow for care and counsel, but significantly fails to cite one case allowing such an award in a maritime wrongful death action. As discussed more fully in Brief of Respondents in Opposition to the Fuhrman Petition, No. 1475, pp. 27-30, the Court of Appeals correctly followed this Court's decision in *Michigan Central R.R. Co. v. Vreeland,* 227 U.S. 59 (1912).

Petitioner also claims that the Court of Appeals erred in rejecting the awards made by the District Court for loss of earning capacity. As discussed more fully in Brief of Respondents in Opposition to the Fuhrman Petition, No. 1475, pp. 22-27, the Court of Appeals' decision was consistent with its decision in *Imperial Oil Ltd. v. Drlik,* 234 F.2d 4 (1956), and the decisions of other Courts in similar cases. *Conte v. Flota Mercante Del Estado,* 277 F.2d 664, 669 (2d Cir., 1960); *Petition of Marina Mercante Nicaraguense, S.A.,* 248 F. Supp. 15 (S.D. N.Y., 1965), modified 364 F.2d 118 (2d Cir., 1966) cert. den. 385 U.S. 1005 (1967); *Candiano v. Moore-McCormack Lines, Inc.,* 382 F.2d 961 (2d Cir., 1967) cert. den. 390 U.S. 1027 (1968); *Moore-McCormack Lines, Inc. v. Richardson,* 295 F.2d 583 (2d Cir., 1961) cert. den. 368 U.S. 989 and 370 U.S. 937 (1962); *Gardner v. National Bulk Carriers, Inc.,* 333 F.2d 676 (4th Cir., 1964); *Downie v. United States Lines Co.,* 359 F.2d 344 (3d Cir., 1966) cert. den. 385 U.S. 897

(1966) which cites with approval *Tullos v. Corley,* 337 F.2d 884 (6th Cir., 1964). Again Petitioner significantly fails to cite one case in conflict with the Court of Appeals' decision on this issue.

The one case to which Petitioner does refer this Court, *Story Parchment Co. v. Patterson Parchment Paper Co.,* 282 U.S. 555 (1931), is singularly inappropriate. That case was an anti-trust action tried to a jury and was entirely unrelated to the determination of compensatory damages in a maritime wrongful death case by a District Court sitting without a jury. Moreover, there is nothing in the *Story Parchment* case which is in conflict with the Court of Appeals' decision. In particular, the Court of Appeals did not require that Petitioner prove her damages to "a mathematical certainty"; see, e.g., the action of the Court of Appeals in affirming awards of the District Court for fringe benefits as not being "clearly erroneous" even though the District Court stated it was "impossible to evaluate authentically" these items of loss and the Court of Appeals' action in affirming an award for pain and suffering even though there was no evidence of the circumstances of Mr. Cook's death.

Petitioner has cited no conflict between the Court of Appeals' decision herein and the numerous decisions in other Circuits which have dealt directly with the problem of determining of damages in a maritime wrongful death action.

The Court of Appeals correctly applied the principles of law enunciated by this Court as well as the Courts of all other Circuits relative to the determination of compensatory damages.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1497

IN THE MATTER OF THE PETITIONS OF UNITED STATES STEEL CORPORATION AND DEN NORSKE AMERIKALINJE A/S FOR EXONERATION FROM OR LIMITATION OF LIABILITY

JEAN E. COOK, Administratrix of the Estate of Charles H. Cook, Deceased,
Petitioner,
v.
UNITED STATES STEEL CORPORATION AND DEN NORSKE AMERIKALINJE A/S, ET AL.,
Respondents.

REPLY BRIEF OF PETITIONER JEAN E. COOK

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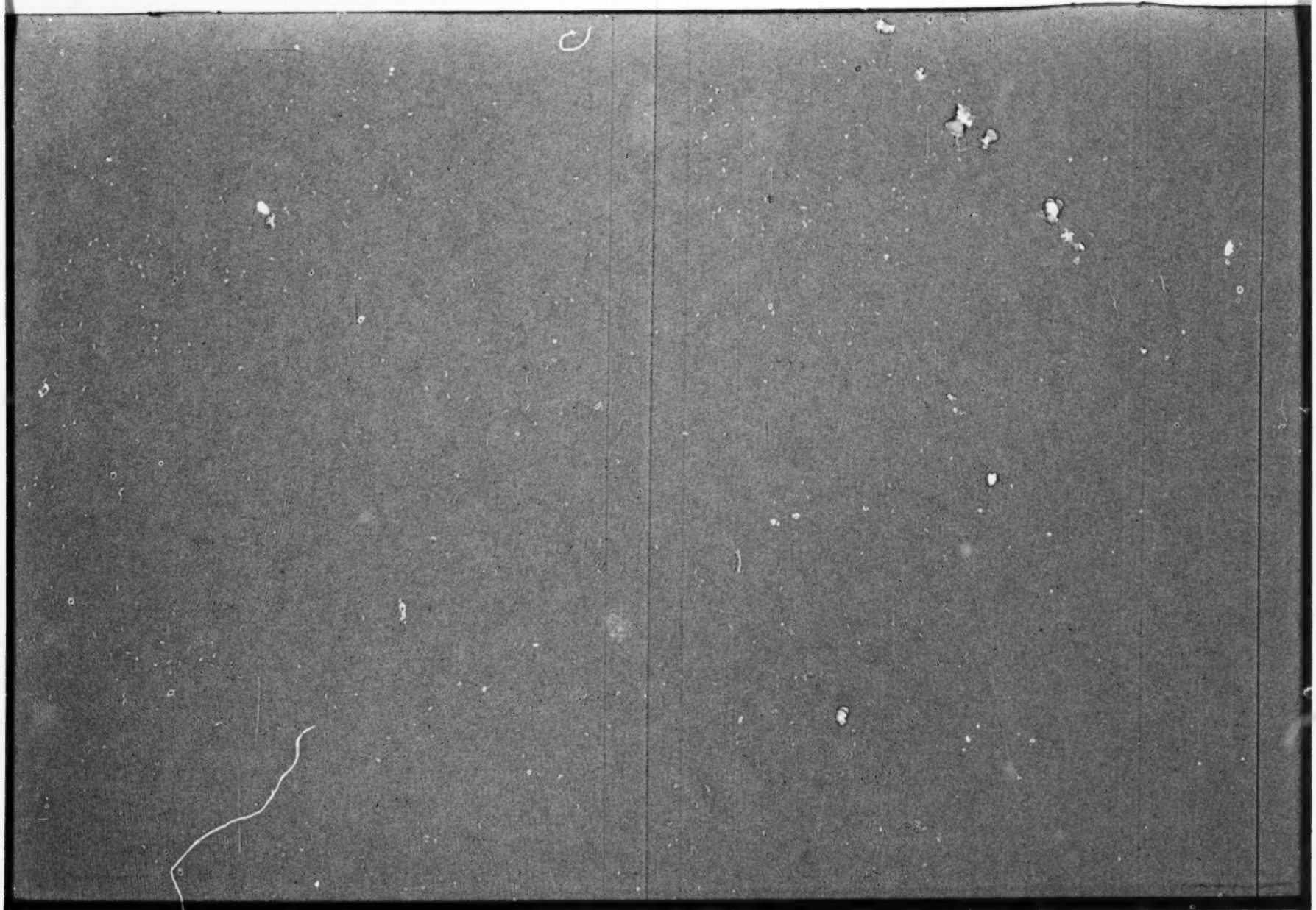

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REPLY BRIEF OF PETITIONER JEAN E. COOK

This Reply Brief is limited to Issue No. 2 of the Petition for a Writ of Certiorari relating to the effect of inflation on future damages.

Respondents were correct on page 4 of their Brief in stating that other cases in the federal system have dealt with the issue of the effect of future inflation on awards for future losses. However, very few cases have dealt with the precise issue of whether, in a *federally* created cause

of action, such as the present case, a trier of fact may take into account the effect of future inflation in determining damages for future losses.

The case cited by Respondents at page 4 of their brief is illustrative of the way the inflation issue has been approached. The court, in *McWeeney v. New York, N.H. & H R.R. Co.*, 282 F.2d 34 (2d Cir. 1960), an F.E.L.A. case, was presented with the question whether to deduct anticipated income taxes in calculating the injured employee's loss of future earnings. In deciding this question in the negative, the court expressly considered the effect of future inflation as an offsetting factor in reducing any alleged excessiveness in the award. The court went on to say:

> Though some courts have sanctioned instructions permitting the jury to take into account inflation between the injury and the trial, there is little or no authority in favor of charging the jury to take future inflation into account. . . . Yet there are few who do not regard some degree of continuing inflation as here to stay and would be willing to translate their own earning power into a fixed annuity, and it is scarcely to be expected that the average personal injury plaintiff will have the acumen to find investments that the are proof against both inflation and depression—a task formidable for the most expert investor. The effect of inflation of 1% a year over McWeeney's 29-year expectancy at trial would go a long way toward offsetting any excess in the verdict due to failure to deduct income tax. At 38.

McWeeney obviously does not reach the same conclusion as the Court of Appeals below, as Respondents assert, but rather recognizes inflation as an unavoidable, pernicious threat to any plaintiff's award and as something that should, and in any event is likely to be taken into consideration in fixing the amount of damages.

In *Jones v. Atlantic Refining Co.*, 55 F. Supp. 17, 22 (E.D. Penn. 1944), the court, in a Jones Act case, expressly held that the lessened purchasing power of money as a result of inflation must be considered in evaluating an injured seaman's future losses. See also *Foster v. Donora Southern R.R. Co.*, 144 F. Supp. 297 (W.D. Penn. 1956), aff'd 241 F.2d 714 (3d Cir. 1957) (F.E.L.A. case); and *Hord v. National Homeopathic Hosp.*, 102 F. Supp. 792 (D.C. 1952), *aff'd* 204 F.2d 397 (D.C. App. 1953) (negligence case).

In addition, it should be noted that the position of the Sixth Circuit Court of Appeals on this very issue has recently been called into question in *Wilmore v. Hertz Corp.*, 437 F.2d 357 (6th Cir. 1971).

The Court (speaking through a 3-judge panel) stated that the discussion in *Sleeman v. Chesapeake & Ohio Ry. Co.*, 414 F.2d 305 (6th Cir. 1969), relating to the effects of future inflation on future damages, upon which the Court below relied (speaking through a different 3-judge panel) was merely *dictum*. Hence, this most recent pronouncement of the Sixth Circuit Court of Appeals leaves open the question whether its decision on this issue might not be different when it is presented to it again.

Finally, petitioner urges this Court to consider the vast number of state court decisions dealing with federally created causes of action, such has F.E.L.A., which have made allowances for the effects of future inflation upon awards for future losses. These cases are collected in the Annotation at 12 ALR 2d 611 under the heading, "Changes in Cost of Living or in Purchasing Power of Money as Affecting Damages for Personal Injuries or Death."

Petitioner contends that the effect of future inflation upon an award for future losses is a very substantial issue

which merits the attention of this Court. It arises in every case dealing with future losses in a federally created cause of action, whether tried in a state or federal court. As Judge Sobeloff said in *Virginian Ry. Co. v. Rose,* 267 F.2d 312 (4th Cir. 1959):

> Common experience attests that the value of the dollar has been subject to consistent depreciation. . . . [Fn.4] . . . Courts, federal and state, throughout the land have taken judicial notice of the diminished purchasing power of money and have held that this is a factor to be considered in making and in reviewing awards of damages. (Cases cited.) At 316.

Considering the frequency with which this issue arises, both in state and federal courts, and the fact that no definitive resolution is possible other than by consideration of this Court, Petitioner respectfully urges that her petition for Certiorari be granted so this serious question of federal law may be resolved.

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